

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR THE APPELLANT

981

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,961

UNITED STATES OF AMERICA,

Appellee

v.

CHARLES E. BROWN

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 12 1970

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- *United States v. Wade, 388 U.S. 218 (1967)

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STATEMENT OF ISSUES

1. Where the prosecution had agreed prior to the commencement of cross-examination of the appellant to inquire of the appellant only with respect to a petty larceny conviction in February of 1969, and where in questioning the defendant below on cross examination, the prosecution exceeded this stipulation and inquired of the defendant with respect to a conviction for larceny (as distinguished from petty larceny), was the defendant thereby prejudiced insofar as his credibility was concerned in the consideration by the jury of the offenses for which he was being tried.

2. Where the prosecution seeks to introduce in evidence pre-trial identification of defendant, should the Court, sua sponte, require a hearing out of the presence of the jury to test the admissability of the identification, where such evidence is patently weak.

3. In view of the vagueness of the identification of the defendant by the government's witness at all stages of the proceedings, did the Court commit error in imposing upon the defendant a relatively harsh three to ten year sentence on conviction of charge of carrying a dangerous weapon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,901

UNITED STATES OF AMERICA,

Appellee

v.

CHARLES E. BROWN,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is based upon Title 28,
Section 1291 of the United States Code.

STATEMENT OF THE CASE

Appellant was indicted on six counts; two counts of armed robbery, two counts of robbery, and two counts of assault with a dangerous weapon. The jury trial was commenced in the United States District Court for the District of Columbia on November 24, 1969 and completed the following day. The jury returned a guilty verdict on the charge of carrying a dangerous weapon (22-2304 D.C. Code 1961 Ed.). Appellant was thereafter sentenced to serve a term of three years to ten years imprisonment. Notice of Appeal was thereafter timely filed with this Court on January 26, 1970.

PRIOR APPELLATE HEARINGS (RULE 3[d])

This case has never previously been before this Court under the same or similar title.

REFERENCES TO RULINGS

(1) Failure of trial Court to direct a mistrial when the prosecutor falsely stated the prior conviction (tr. 104).

(2) The Court's imposition of the maximum sentence.

STATEMENT OF THE FACTS

On May 9, 1969, at approximately 9:00 P.M. one James Carrington, and his nephew, Edward Marrow met at the former's home on 14th Street, N.W. and decided to walk north one block on 14th Street to go to the liquor store (tr.19). Carrington had already consumed a substantial amount of alcohol (tr.30). When they arrived at the store each purchased 1/2 pint of whiskey and Marrow purchased a six-pack of beer as well. In the course of paying for their purchases, both men displayed what appeared to be large amounts of cash. During this time there was present in the store a man dressed in a red shirt and dark trousers apparently conversing with some of the employees (tr. 30).

After finalizing their transaction Carrington and Marrow left via the 14th Street exit. As they were leaving they testified that they noticed a man leaving the store immediately behind them. As they proceeded across 14th Street, a man attired in a red shirt and two other men who were apparently waiting outside the store, crossed the street also. Carrington and Marrow reached the opposite curb, and a few steps later, they were allegedly assaulted and robbed (tr. 32).

In the course of the alleged robbery, Marrow was held by a man with a hawk-billed knife who at all times stood behind him with his arm around the victim's neck (tr.36), thereby depriving him of the opportunity to view his assailant while his uncle was being forcibly held by the two other accomplices. Hence, all Marrow could see were the two men holding James Carrington.

After the knifeman had emptied Marrow's pockets from behind he pushed him forward. Marrow ran away towards his car which was parked further South on 14th Street. When he had proceeded some distance, Marrow turned back towards the scene of the robbery and then saw his Uncle, Carrington, being held against the wall of a building by two of the assailants, the third standing several feet away; with his back toward Marrow.

A few moments later a Metropolitan Police cruiser turned the corner and was hailed by Marrow. The three assailants then utilized an alley to make their escape. This alley ran from Newton Street around to 14th Street. Marrow then informed the officers of what had just transpired. One officer, Raymond Denz, accompanied Marrow on foot to the area of the alleged assault. While walking on 14th Street, Marrow spied three men walking easterly on Monroe Street. At this time Marrow and Denz were on the corner of 14th and Monroe Streets, N.W. (tr. 62), almost a block and a half away from the three suspects. Officer Denz and Mr. Marrow approached the three men

from behind. At that particular time two men were walking at a rather rapid pace and several steps behind them was the appellant. The appellant made no effort to quicken his pace or to escape. The appellant was apprehended by Officer Denz. The other two men fled from the area (tr. 63).

There is a conflict in the evidence as to what next occurred. Officer Denz testified that Mr. Marrow made an immediate identification of the defendant (tr. 63). Mr. Brown, on the other hand, testified that the only identification Marrow made at the time was that one of the robbers was wearing a red shirt (tr. 93). Mr. Brown further testified that the other two men ran when Officer Denz yelled for them to stop, but he proceeded in an orderly manner down Monroe Street (tr. 92).

Brown was searched by Officer Denz at the scene. All that was recovered was his own wallet, a watch, and a knife. (tr. 64). No property belonging to the complainants was recovered from the Appellant.

Appellant was then taken to the precinct station where formal booking procedures were commenced. During this time both Marrow and Carrington, who was still under the influence of alcohol, entered the station, saw the Appellant seated there amidst the officers and they then identified him as one of the assailants.

Appellant was never afforded a line-up or given the aid of counsel during this identification process.

Trial was commenced on November 24, 1969. The government's case consisted of testimony presented by Carrington

Marrow and Officer Denz. The knife recovered from the appellant was also introduced into evidence. The defendant's case comprised of the testimony of a Mr. Malton, manager of the liquor store, the testimony of Robert Brown, appellant's brother and the testimony of appellant himself.

Prior to the appellant taking the stand the following colloquy took place between counsel for the Government and the Court:

MR. BUCKLIN: Your Honor, there may be a Luck problem.

THE COURT: What is the Luck problem?

MR. BUCKLIN: A prior conviction, Your Honor.

THE COURT: Of what?

MR. BUCKLIN: There are several of them.

THE COURT: What are they?

MR. BUCKLIN: Housebreaking, a burglary and a grand larceny and two petty larcenies.

THE COURT: They are all admissible.

MR. BUCKLIN: I would ask Your Honor to let me use one. I would only use the one petty larceny which was in February of 1969.

THE COURT: All right.

Toward the completion of the cross-examination of the appellant, despite the stipulation that the government would refer only to the petty larceny conviction, the following question was addressed to the defendant below by

the prosecutor:

Q. Are you the same Charles E. Brown that was convicted of larceny in March, March 10, 1969?

A. March 10, 1969?

Q. Mr. Goldberg: I think you ought to call it petty larceny.

The Witness: They picked me up for petty larceny; yes; in the Safeway.

Mr. Bucklin: I have no further questions

The Court: That is all, sir.

SUMMARY OF ARGUMENT

I. Pursuant to the holdings of this Court in Luck v. U.S., 348 F.2d 763, the Assistant U.S. Attorney, informed the Court of all prior convictions before defendant took the stand. The Government stipulated that it would use only the conviction on a charge of petty larceny in cross-examination of the defendant, and the Court consented. Despite this stipulation by the Government, during the cross-examination of the witness, the Assistant U. S. Attorney chose to designate the offense as "larceny" rather than as petty larceny, the true offense, and then abruptly terminated examination of the defendant.

It is probable that the jury inferred the conviction was for larceny.

It is respectfully submitted that the prosecution should have adhered to the precise language of the conviction as that of petty larceny. Coming as it did, as the final question on cross-examination, the term may well have left in the mind of the jury prejudicial pre-judgments which a provocative force in the conviction of the defendant herein, and justifies granting of a new trial.

2. Much of the evidence in the prosecution's case bore on the identification of the defendant. It was obvious that such identification was made under questionable circumstances which raised the issue of whether there was opportunity to identify the defendant. A voir dire

examination outside the hearing of the jury was never conducted as discussed by this Court, in CLEMMONS v. U.S., 133 U.S. App. D.C. 27 (1968), to test the pre-trial identifications upon which the in-Court identifications were based. It is reasonable to inquire whether the Court, sua sponte, should have ordered the voir dire out of the hearing of the jury, and whether failure to do so was prejudicial error.

3. In light of the vague nature of the testimony linking the appellant by identification to the crimes with which he was charged, it is submitted that the Court should have taken this into consideration at the time of fixing the penalty; obviously, in disregard of same, the Court rendered the maximum sentence to appellant allowable under law, which action constituted an abuse of discretion which should be reviewed by this Court with a view to diminution thereof should this Court not otherwise find basis for retrial.

Under no circumstances can the judgment in this case be considered fair or just. Despite the verdict there is in this case a serious doubt as to guilt or innocence of the appellant and the Court should have been equally as responsive to this factor in the sentencing of appellant as it was to appellant's previous criminal record.

It is appellant's contention that the Court abused its discretion by sentencing appellant to the maximum sentence in light of these facts.

Therefore, appellant seeks a new trial for the purpose of excluding the identification evidence and testing the import of the remainder of the prosecutions evidence, to sustain the charges in the indictment.

ARGUMENT

I

THE COURT ERRED BY NOT DECLARING A MISTRIAL WHEN THE PROSECUTOR ERRONEOUSLY INTRODUCED A PRIOR FELONY CONVICTION RATHER THAN A PRIOR MISDEMEANOR CONVICTION APPROVED BY THE COURT.

At the opening of appellant's direct examination, the prosecutor notified the Court of a Luck problem (Luck v. United States, 343 F. 2d 763, [D.C. Cir 1965]). The Court asked the prosecutor to list the prior convictions, and agreed to allow the Assistant U.S. Attorney to introduce only the prior conviction of petty larceny. (tr. 73).

At the conclusion of the prosecutor's cross-examination as his final question, he inquired of the defendant regarding a prior conviction for "Larceny". (tr. 104)

It was regrettable that the prosecution did not choose its terms more accurately. The entire concept of the Luck case, supra., is to allow the defendant to testify without fear of having his entire police record paraded before the jury, with the resulting harm. There are times, as noted in the Court's decision, when it is more important for the jury to hear the defendant's side of the story than to have the defendant remain silent in fear of being discredited by virtue of past convictions.

In this particular case the Court consented to allow one prior conviction to be introduced, to wit; petty larceny. When the prosecuting attorney introduced the conviction as that of "larceny" the connotation inferred a much more

serious and onerous crime than the one appellant was convicted of. It was the last question asked and therefore was probably the freshest in the minds of the jury when they commenced deliberations.

Whether the prosecutor acted intentionally or was careless in his terminology, or whatever his reasoning, an indelible impression was created in the minds of the jury prejudicial to appellant. Hence, the Court should have automatically declared a mistrial.

Failure to do so undoubtably resulted in prejudicial error to the appellant, and hence a new trial on all issues should be ordered.

ARGUMENT II

THE COURT ERRED, IN FAILING, SUA SPONTE, TO DIRECT A VOIR DIRE HEARING OUTSIDE OF THE PRESENCE OF JURY, WHERE EVIDENCE OF IDENTIFICATION OF DEFENDANT WAS PATENTLY VAGUE.

The in-Court identification of defendant was the backbone of the prosecution's case. These identifications were extremely vague and were never subjected to the test of a pre-trial hearing to establish their admissability.

The appellant was sentenced from three to ten years imprisonment, the maximum sentence provided by law for the offense for which he was convicted. The Court imposed this sentence primarily on the basis that appellant had a series of minor skirmishes with the law.

It is appellant's contention that the Court should have taken more into consideration than just prior convictions; namely, the fact that the prosecution relied almost completely on the in-Court identifications of the appellant by the complaining witnesses. A superficial analysis of the evidence adduced at the trial would show that these identifications were based upon certain pre-trial identifications which were never subjected to the test of a voir dire hearing as prescribed in Clemmons v. United States, 83 U.S. App. D.C. 129, (1968). Further reflection on the testimony surrounding these pre-trial identifications would show that they were obtained under highly questionable circumstances (infra.).

The first identification put into evidence was that

made by Mr. Marrow, one of the complaining witnesses. During his direct examination it was brought out that he was accosted from behind, and that during the robbery his assailant at all times remained directly behind him (tr.36). Hence, it may logically be argued that it would have been impossible for the witness to have gotten a good look at his assailant both because of the stressful circumstances and from the relative position of the parties. A view of the assailant would only be possible when he realized he didn't have his car keys approximately half a block from the scene of the assault. It was also established that at the time of the robbery it was dark and hence exceedingly difficult to see and distinguish individual facial characteristics especially at any distance (tr. 54).

However, after the witness had notified police of the assault and robbery, he and Officer Denz continued to search the neighborhood. Sometime during this search the witness saw three men on the street, one of whom was wearing a shirt similar in color to the one being worn by appellant on that evening. He and the Officer followed the appellant who at no time displayed any fear or apparent concern that they were following him. Surely, one who just committed a robbery would be expected to flee from the police and his victim (tr.56).

Once the appellant was arrested, the witness, Marrow, accused him of being his assailant. It must be noted that this identification took place sometime after the assault,

and approximately a block and a half from the scene of the robbery. The admissability of identifications obtained by one man line-ups such as in the case at bar has been highly restricted by this Court in Russell v. U.S., 133 U.S. App. D.C. 77 (1967).

In the latter case, this Court ruled that such show-ups must be made very shortly after the crime occurred and at the same place where the crime had been committed. The Court further said that such line-ups were allowed solely to protect an innocent man from the embarrassment of the booking and line-up to follow. By mere virtue of the fact that the witness admitted to never getting a good look at his assailant (tr. 51) this identification is questionable, but when the circumstances around which this identification are considered, it can easily be seen that the ability of the witness to make an objective decision as to whether the appellant was, in fact, the man he thought assaulted him is rather patently dubious. Hence, the probability that this identification would have been admitted into evidence, had a hearing been held, is doubtful.

This conclusion becomes more obvious when the second identification is taken into account. This took place within the confines of the police station when appellant was escorted into the station house by the arresting officers in the full view of Harrow and Carrington. This situation closely resembles the fact pattern in U.S. vs. Wade, 388 U.S. 218. In the latter case, appellant was under constant guard by policemen during his pre-trial identification.

Hence, the Supreme Court ruled that pre-trial identifications must be free of any extraordinary suggestiveness.

In the case of Russell v. U.S., supra, it was held that in order for the police to compel a suspect to return to the place of an alleged crime and to be displayed to an eye witness in a one-man line-up, if such an identification, results from the one-man line-up, in order to be admissible, it must be held under circumstances which will benefit the release of an innocent party. In other words, the police must bring the suspect back to the exact place where the crime was committed, within a very short time of the commission of the crime. Hence, the Russell case supra, sanctioned the practice only so long as the police used the technique in those infrequent instances when a suspect is apprehended either in the course of committing the crime or very shortly thereafter.

In the case at bar, Marrow's identification took place sometime after the alleged assault and several blocks from the scene of the crime.

Considering the prevailing conditions adduced at trial; the lateness of the hour, the similarity in dress of the defendant and the alleged assailant, and the fact that the defendant appeared to be a member of a group of three men, it becomes obvious that in order for this identification to have been valid the officer should have returned the defendant to the scene of the crime where both suspects could have viewed the defendant under like conditions when

they were assaulted.

It is also evident that Marrow was so excited at the time , having just been assaulted and robbed at knife point and having run several blocks in pursuit of his alleged assailant, that the validity of the identification at very best is questionable.

Focusing on the station house identification it is quite obvious that it also could be tainted. Both men were in the precinct station when the defendant was escorted through the door, handcuffed, by several police officers. They then said that the appellant was one of the assailants. Needless to say, such testimony would be excluded under the line of cases comencing with Simmons v. U.S., 390 U.S. 377 and Wade v. U.S., supra., and being further clarified in this jurisdiction by Clemons v. U.S., supra.

In reviewing the transcript it becomes obvious that had these identifications been excluded, the prosecution's evidence would not have been sufficient to convict the defendant. There was no other evidence connecting the defendant with the crime. Hence, the Court should have dismissed the case. Its failure to do so was obviously a prejudicial error in terms of Chapman v. California, 386 U.S. 13 (1967).

Further reliance for this position is placed on the case of Sera-Leyva v. U. S., 133 U.S. App. D.C. 125 (1969) (a pre-trial identification case) wherein this Court said

at page 127:

"The claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it," citing Stovall, supra at 302 and "each case must be considered on its own facts," citing Simmons, supra. Where the record on appeal is insufficient for this Court to determine whether due process was violated, as in the case of a trial held prior to June 12, 1967, and a record made without focus on pre-trial confrontation, we have remanded for further exploration in the light of Wade-Gilbert-Stovall."

Applying the foregoing standards to the case at bar, it is readily obvious that the identifications in this case were shrouded with suggestive overtones and that they should have been subjected to a pre-trial hearing to test their sufficiency.

The vagueness of the identification and the likelihood that the identification would not stand a pre-trial test justified the trial Court, sua sponte, in excluding the jury to test the strength and sufficiency of the factual basis for identification.

Appointed counsel in this case were both engaged in civil practice. It must be concluded that pre-trial testing, in light of all the circumstances would have rendered the identification inadmissible and justify this case being returned for retrial.

ARGUMENT III

THE COURT ERRED IN IMPOSING A MAXIMUM SENTENCE ON APPELLANT IN VIEW OF THE VAGUENESS AND QUESTIONABLE ADMISSABILITY OF THE EVIDENCE WITH RESPECT TO IDENTIFICATION OF THE APPELLANT.

Upon the completion of the trial and the return of a guilty verdict by the jury on the charge of carrying a concealed weapon (22 DCC 3204), the Court imposed the maximum sentence, three years to ten years, upon the appellant.

Appellant invites the consideration of this Court to the questionable evidence of identification which is discussed in some detail in Argument number two. The evidence adduced at trial pertaining to the identification of the appellant in and of itself was of poor quality and it is respectfully submitted that the Court should have considered this when imposing sentence upon the appellant.

The trial Court, it would appear, placed great weight on appellant's prior conviction in rendering the maximum sentence.

It is respectfully submitted that in an overall consideration of the evidence bearing on identification, and the nature of the charge for which the appellant was convicted, that the punishment fixed by the Court was unduly harsh and excessive, and that this Court should, in connection with the consideration of the appeal, remand for new trial, or for such other appropriate action as to the Court may seem just and proper in the circumstances.

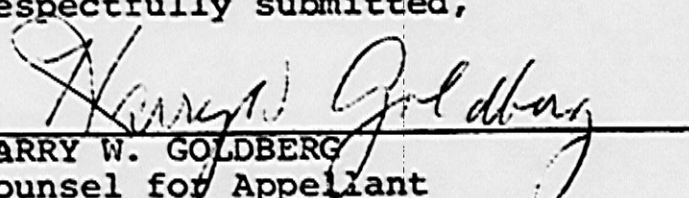
CONCLUSION

The identifications of the defendant in this case were highly questionable in the light of Russell v. U.S., supra, Gilbert v. California, supra., and Wade v. U.S., and Stovall v. Denno, supra. The Court should have acted sua sponte and ordered a voir dire examination outside the hearing of the jury as to the circumstances surrounding the identifications. Only in this manner would have these aforementioned decisions been given their true weight.

Even if this was not an error the Court should have taken the dubious nature of the identifications into consideration when sentencing the appellant. On the contrary the Court failed to take notice of this fact and sentenced the appellant to the maximum number of years of incarceration allowed by the statute. This ruling should be vacated and new trial granted on the issues.

Finally, the Court should have declared a mistrial when after it had consented to the admission of a specific prior conviction, the prosecutor introduced another conviction creating a more damaging and harmful impression of the defendant in the eyes of the jury. The failure of the Court to do this and the additional arguments cited are grounds for a new trial before an impartial jury.

Respectfully submitted,


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BRIEF FOR APPELLEE

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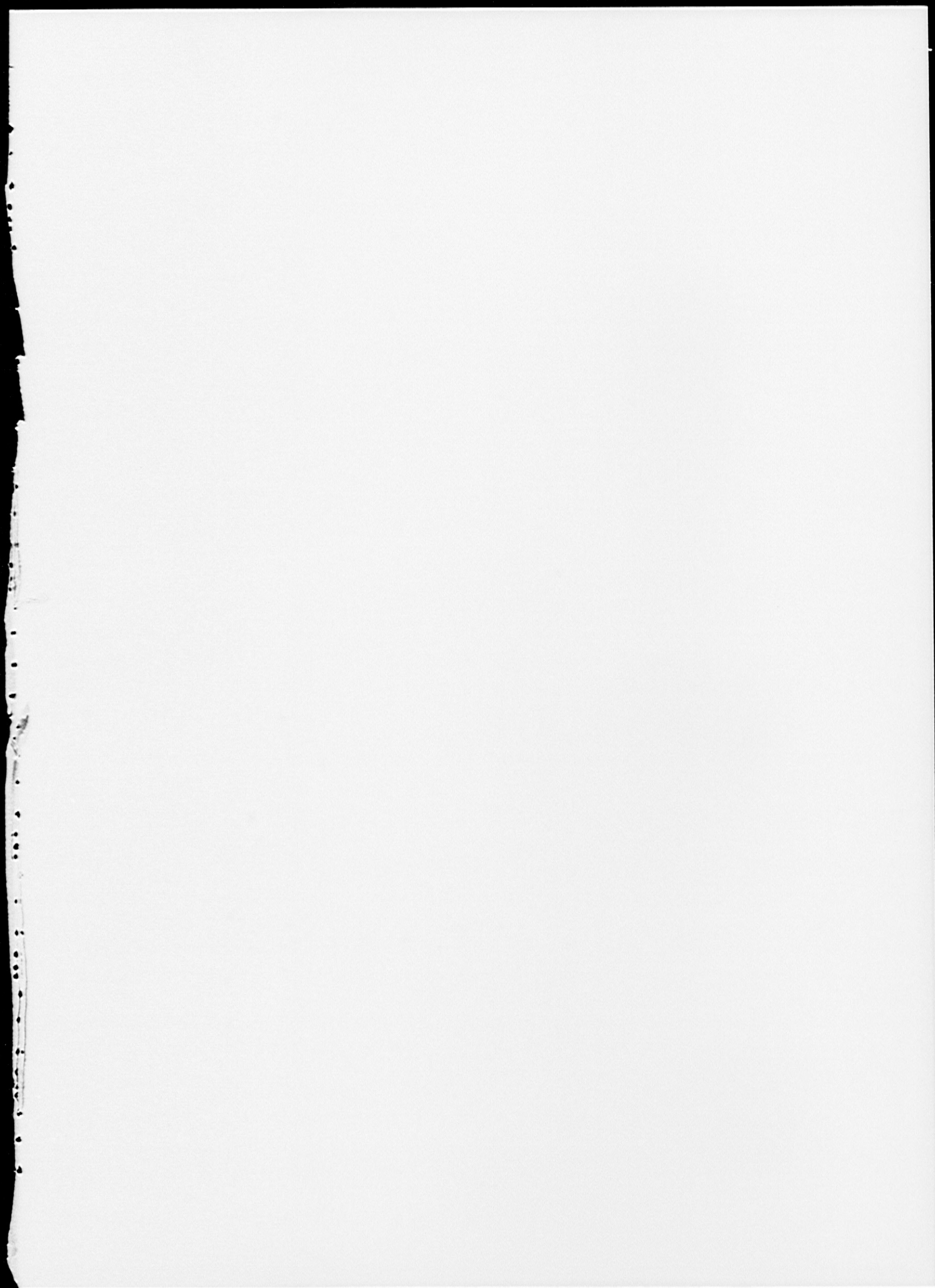
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OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the District Judge erred in not ordering *sua sponte* a hearing out of the presence of the jury to inquire into identifications of appellant made prior to trial?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

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CHARLES E. BROWN, APPELLANT

Appeal from the United States District Court
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed June 27, 1969, appellant was charged with two counts of armed robbery, two counts of robbery and two counts of assault with a dangerous weapon, in violation of 22 D.C. Code §§ 3202, 2901 and 502, respectively. His trial¹ was held before Chief Judge Curran and a jury on November 24 and 25, 1969. The

¹ References to the transcripts in this case will be as follows: "Tr. I" for the transcript of the part of the trial occurring on November 24, 1969, "Tr. II" for the portion of the trial which took place on November 25, 1969, and "Sent. Tr." for the sentencing proceedings on January 16, 1970.

jury acquitted him of both armed robbery counts, and one of the two counts charging assault with a dangerous weapon.² He was found guilty on the other assault with a dangerous weapon count.³ Appellant was sentenced to serve a term of imprisonment of from three to ten years. This appeal followed.

The Government's Case

In the evening of May 9, 1969, James Carrington and his nephew, Edward Marrow, left Carrington's home at 1483 Newton Street, N.W., shortly after 8:00 p.m. and walked about a block to the C. C. Liquor Store, located on the southeast corner of 14th and Monroe Streets, N.W. (Tr. I 17-19, 32, 50; Tr. II 6). They purchased beer and liquor at the store, each paying separately with bills of large denomination. During the five or six minutes they were inside the liquor store, there were only a few other persons in the store. One of them was appellant, whom James Marrow particularly remembered because he was wearing a red shirt (Tr. I 30-31, 41-44).

As he and his uncle left the store, Marrow noticed two other men standing on the sidewalk immediately outside the door. Sensing trouble, he grabbed Carrington's arm,

² The two robbery counts were dismissed *sua sponte* by the judge before the case was submitted to the jury (Tr. II 18).

³ We note that appellant's counsel erroneously advises this Court in his brief that appellant was convicted of carrying a dangerous weapon (22 D.C. Code § 3204). See Brief for appellant at 1, 18. He makes no reference at all to the conviction of assault with a dangerous weapon. Counsel representing appellant on this appeal represented him at trial as well and of course can be charged with knowledge of the jury's verdict. At sentencing the trial judge again stated that appellant was convicted of one count of assault with a dangerous weapon (Sent. Tr. 2). As a result of an apparent clerical error, the conviction was entered on the Judgment and Commitment form as one count of carrying a dangerous weapon. However, the error was noticed and corrected by Judge Curran's order filed May 27, 1970, after this Court had remanded the record for that purpose. Appellant's counsel, whose original appointment as trial counsel was made on August 1, 1969, filed his brief on October 9, 1970, over four months after the clerical error was noted and corrected.

and the two of them rushed across 14th Street (Tr. I 32). Appellant and the two other men ran after them (Tr. I 32, 58-59). Marrow and Carrington reached the west side of 14th Street and had turned into the 1400 block of Newton Street when appellant and the other two men caught up with them (Tr. I 33, 50). Appellant grabbed Marrow around the neck with one arm, shoved a hawk-billed knife against his throat with the same hand, and told him, as Marrow recalled it, that he would "pull his head off". Holding the knife tight against his neck,⁴ appellant went through Marrow's left rear pocket while one of the other two men rummaged through his other pockets (Tr. I 33-34). The two robbers relieved Marrow of his wallet, car keys and about \$80, and then pushed him out of the way (Tr. I 34, 38, 59). He ran toward his car, which was parked a half-block farther west on Newton Street, but when he got near the car he realized that the robbers had taken his car keys and ran back toward his uncle (Tr. I 34). By this time two of the robbers were holding Carrington up against a wall and were going through his pockets while appellant about six feet away, was pointing the knife at him (Tr. I 34-35, 37, 40). The two men took \$25 and a knife⁵ from Carrington's pockets (Tr. I 20-21,23).

At this moment a Metropolitan Police scout car turned into the 1400 block of Newton Street from 14th Street. Marrow ran into the street and flagged it down (Tr. I 35). Appellant and the other two men ran down an alley leading from Newton Street onto 14th Street (Tr. I 38). After Marrow told Officer Raymond Denz what had happened and where appellant and his confederates had fled, he and the officer ran down Newton to 14th Street

⁴ Marrow's neck was cut slightly—a "nick," as he put it—and the pressure of the blade raised a welt on his neck (Tr. I 36).

⁵ Carrington never saw the knife again. When appellant was arrested a short time later, a hawk-billed knife was seized from him (see Tr. I 64), but Carrington examined it at trial and stated it was not the one taken from him because his was a smaller knife with a straight blade (Tr. I 25-26).

in pursuit (Tr. I 39, 55, 61, 67).⁶ When they reached 14th Street, Marrow spotted the three men on the east side of 14th at Monroe Street, one-quarter of a block from where he and Officer Denz were standing. He pointed the men out to the officer and continued to lead the pursuit as the men turned east on Monroe Street (Tr. I 39, 56, 62, 69). Appellant, who was lagging a few steps behind the other two, was apprehended in the 1300 block of Monroe Street when Marrow ran up to him and, placing his hand on him, told Officer Denz, "This is him there" (Tr. I 41, 56, 63). Appellant was immediately placed under arrest; the other two men ran and were never apprehended (Tr. I 41, 56, 61, 63, 67-68). Marrow identified appellant as the man who had robbed him with a hawk-billed knife. Officer Denz then searched appellant and recovered a hawk-billed knife from his right front pants pocket (Tr. I 41, 59-60, 63-64).

The Defense

Appellant testified in his own behalf. He stated that he entered the liquor store at around 8:00 p.m. and remained inside, talking to the owner until about 8:55 p.m. (Tr. I 84-85). He admitted seeing Carrington and Marrow enter the store about 8:45 p.m., make their purchases and leave (Tr. I 86, 99-100). Appellant claimed, however, that he did not follow them across the street, but instead left the store and was headed eastward on Monroe Street on the way to see a friend when he was stopped by Officer Denz at gunpoint, searched and then arrested (Tr. 89-93). He denied that Marrow was able to identify him positively at the scene of the arrest (Tr. I 94),⁷ but he

⁶James Carrington, the other victim, did not join in the chase but returned to his home, a short distance up the 1400 block of Newton Street (Tr. I 26-27).

⁷Appellant claimed he saw Marrow again at the precinct after he was arrested and that Marrow identified him at that time (Tr. I 94, 99).

admitted that the hawk-billed knife seized by the officer was his (Tr. I 91).⁸

The manager of the liquor store was called by the defense and testified that appellant was in and out of the store about four or five times that evening, but he could not recall exactly when appellant was in the store or whether he talked with him at all (Tr. II 5-11).

ARGUMENT

The District Court did not err in failing to order *sua sponte* a hearing to inquire into the identifications of appellant made prior to trial.

(Tr. I 39-41, 55-64, 67-69, 73; Tr. II 29)

Appellant's principal argument is directed at the identifications made out of court by Marrow and Carrington, the Government's two lay witnesses at trial. In his view, the identifications were made under impermissibly suggestive circumstances and during occasions when he was entitled to have counsel present. He concludes that, because the identification issues were not inquired into at a hearing before trial or out of the presence of the jury during trial, the case should be remanded for a new trial.⁹ These contentions, at best, border on the frivolous.

Dispositive in our view is the fact that no request for an identification hearing, either before or during trial, was made by appellant's trial counsel (who also represents him on this appeal), and no objection was noted at trial to any of the identification testimony of James Marrow, the Government's identifying witness, and Officer

⁸ Appellant also testified that he had met Carrington and Marrow before the 9th of May when he visited with Carrington and Marrow's mother in the company of Marrow's niece, who was his friend (Tr. I 86-89). Testifying in rebuttal, Marrow stated that his only niece was about eleven years old and that he had never seen appellant before May 9th (Tr. II 12-13).

⁹ See Brief for appellant at 17.

Denz.¹⁰ Under these circumstances appellant has effectively relinquished his opportunity to challenge the identification procedure in this Court. See *Solomon v. United States*, 133 U.S. App. D.C. 103, 106, 409 F.2d 1306, 1309 (1969).

Appellant, however, suggests that the trial judge was obligated to order a hearing *sua sponte* (apparently either during trial or before trial) to determine whether the identifications were proper within the purview of *Stovall v. Denno*, 388 U.S. 293 (1967); *United States v. Wade*, 388 U.S. 218 (1967); and *Russell v. United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied*, 395 U.S. 928 (1969). We find no support in the decisions of this Court for placing such a burden on the trial judge. Although *Solomon v. United States*, *supra*, and *Clemons v. United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969), suggest how the trial judge can anticipate and alleviate problems in cases involving out-of-court identification testimony, both decisions obviously anticipate that the judge will be acting upon an objection to, or at least an inquiry by defense counsel into, the identification testimony. Neither case requires the trial judge to make his own inquiry where, as in this case, no irregularity has been brought to his attention or is apparent from the record. See *Solomon*, *supra*, 133 U.S. App. D.C. at 106, 408 F.2d at 1309; *Clemons*, *supra*, 133 U.S. App. D.C. at 34, 408 F.2d at 1237, especially note 4. It is not too much to require of trial counsel that he investigate¹¹ and bring to the court's attention obvious problems in an area of the criminal law which has received repeated and widely publicized scrutiny by the Supreme Court and by this Court over the last few years.

¹⁰ James Carrington, the other victim, stated he was unable to identify any of his assailants and was not called on to identify appellant in court (Tr. I 20-21).

¹¹ Appellant's counsel was appointed as his trial counsel on August 1, 1968, almost four months before the trial began.

In any event, the out-of-court identifications about which the jury heard contain no taint of illegality. The only out-of-court identification on which a viable¹² attack could be made is his identification by James Marrow at the scene of the arrest. The procedure followed there falls squarely within the on-the-scene identifications permitted under the *Wise*¹³-*Russell* doctrine. Appellant was out of sight of the victim Marrow and the pursuing officer for only a few seconds between the robbery and assault and his apprehension. Cf. *Solomon v. United States*, *supra*. He was arrested within five minutes and one and a half blocks of the crime scene. He was, in fact, apprehended by the victim himself who accompanied the officer on the pursuit, see *Stewart v. United States*, 135 U.S. App. D.C. 274, 418 F.2d 1110 (1969), and was spontaneously identified even before the officer caught up with him (see Tr. I 39-41, 55-56, 61-63, 67-69). The identification then made by Marrow in the officer's presence was non-suggestive. There is no indication that the officer did anything to suggest that appellant was one of the robbers; and as the prosecutor alertly brought out, Marrow made his identification before the search which produced the hawk-billed knife which to him was unfortunately all too

¹² Appellant also asserts that Marrow identified him under suggestive circumstances in the precinct after he was arrested. No evidence of a precinct identification was introduced by the Government, nor did appellant cross-examine Government witnesses on the matter. Cf. *United States v. Green*, D.C. Cir. No. 22,710, decided November 12, 1970. The only support for the assertion that an identification was made is appellant's self-serving statement that Marrow identified him at the precinct (Tr. I 94, 99). There is no support in appellant's testimony or anyone else's for the recitations of the "details" of the events at the precinct made at pages 14 and 16 of appellant's brief. Accordingly, appellee requests that these non-record "facts" be ignored by this Court in reviewing this case. See *Johnson v. United States*, D.C. Cir. No. 21,851, decided June 20, 1969, slip op. at 9-10, *reaffirmed en banc*, 138 U.S. App. D.C. 174, 179 n.8, 426 F.2d 651, 656 n.8, *cert. granted*, 400 U.S. — (1970).

¹³ *Wise v. United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), *cert. denied*, 390 U.S. 964 (1968).

familiar (Tr. I 59-60).¹⁴ Appellee submits that a careful review of the record demonstrates no error or prejudice to appellant, either as to the identifications introduced against him or otherwise.¹⁵

¹⁴ Even assuming that there *was* an identification of appellant made at the precinct by Marrow, and further that it was made under impermissibly suggestive circumstances, Marrow's original observations of appellant in the liquor store and at the time of the offenses and his on-the-scene identification discussed above provided an independent basis for his in-court identification of appellant. *Cf. Gregory v. United States*, 133 U.S. App. D.C. 317, 410 F.2d 1016, *cert. denied*, 396 U.S. 865 (1969).

¹⁵ Appellant's other assertions of error do not require extended discussion. He complains because the prosecutor, seeking to impeach him with a previous conviction for petit larceny (see Tr. I 73), asked him if he had been convicted of "larceny" (Tr. I 104). Whatever prejudice this created was overcome by the immediate correction of the question by appellant's counsel (*ibid.*), appellant's answer that he was convicted of *petit* larceny (*ibid.*), and the court's instruction to the jury that appellant was questioned about his previous conviction for *petit* larceny (Tr. II 29).

Nor do we think appellant's sentence of three to ten years for assault with a dangerous weapon was excessive. The maximum term permitted for this offense is ten years (22 D.C. Code § 502), and the sentence here, which falls within this limit, is unassailable on appeal absent an abuse of discretion. *See Leach v. United States*, 122 U.S. App. D.C. 280, 281, 353 F.2d 451, 452 (1965), *cert. denied*, 383 U.S. 917 (1966). The record here does not support even the suggestion that the trial judge abused his discretion. Contrary to appellant's assertion, the identifications made of him at trial and at the scene of his apprehension by Marrow were clear and precise (see Tr. I 40-41, 53, 59-64) and were not made under illegal circumstances. In addition, considering appellant's previous convictions of housebreaking, burglary, grand larceny and petit larceny (see Tr. I 73), we do not find his sentence severe. *Cf. Barnett v. United States*, 131 U.S. App. D.C. 192, 403 F.2d 918 (1968).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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